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No. 95-1330

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

In Re CLEVELAND TANKERS, INC., as owner and operator of the M/V "*Jupiter*," for exoneration from or limitation of liability.

AMERICAN STEAMSHIP COMPANY,

Petitioner,

vs.

CLEVELAND TANKERS, INC.; TOTAL PETROLEUM, INCORPORATED; FIREMAN'S FUND INSURANCE COMPANIES,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT CLEVELAND TANKERS, INC.

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QUESTIONS PRESENTED

1. Should this Court deny certiorari where Petitioner has not demonstrated any relevant conflict in the United States appellate courts, and where the Petitioner's writ is merely an attempt to reargue factual findings made by the trial court and affirmed by the United States Court of Appeals for the Sixth Circuit?

2. Did the District Court and the Court of Appeals for the Sixth Circuit correctly rule that the conclusions and opinions contained in the United States Coast Guard report were inadmissible?

DISCLOSURE OF CORPORATE AFFILIATION

Cleveland Tankers, Inc. is a wholly owned subsidiary of Ashland Oil, Inc. There are no non-wholly owned subsidiaries of Cleveland Tankers, Inc.

TABLE OF CONTENTS

	Page
Questions Presented	i
Disclosure of Corporate Affiliation	ii
Table of Contents	iii
Table of Citations	iv
Counterstatement of the Case	1
A. The Underlying Proceedings.	1
B. Counterstatement Of Facts.	3
Reasons for Denying the Writ	8
I. This Court Should Deny Certiorari Where Petitioner Has Not Demonstrated Any Relevant Conflict In The United States Appellate Courts, And The Petitioner's Writ Is Merely An Attempt To Reargue The Factual Findings Made By The Trial Court And Affirmed By The United States Court Of Appeals For The Sixth Circuit.	8
A. Petitioner Fails To Present Any Conflict Of Law Or Legal Error In Support Of Its Writ.	8
B. Petitioner Improperly Seeks Further Review Of The Lower Court's Factual Analysis And Findings.	14

Contents

Page

C. Conclusion. 18

II. The Sixth Circuit Correctly Ruled That The Conclusions And Opinions Contained In The United States Coast Guard Report Were Inadmissible. 19

A. American Steamship Has Not Demonstrated Any Basis For This Court To Grant Its Petition. 19

B. The Plain English Language Of The Applicable Federal Rules Of Evidence Mandate Exclusion Of The Opinions/ Conclusions Portion Of The U.S.C.G. Report. 21

C. The Admiralty Caselaw Mandates The Exclusion Of The Conclusions/Opinions Portion Of The U.S.C.G. Report. 24

D. Conclusion. 25

Conclusion 26

TABLE OF CITATIONS

Cases Cited:

Addison v. Holly Hill Fruit Products, 322 U.S. 607 (1944) 22

Contents

	Page
Andrus v. Glover Construction Co., 446 U.S. 608 (1980)	22
Beech Aircraft Corp. v. Rainey, 488 U.S. 153 (1988)	25
Complaint of American Export Lines, Inc., 73 F.R.D. 454 (S.D.N.Y. 1977)	20
Exxon Company U.S.A. v. Sofec, Inc., 54 F.3d 570 (9th Cir. 1995), *cert. granted*, 116 S. Ct. 493 (1995)	9
Haggerty v. Moran Towing, 556 N.Y. 2d 314, 162 A.D. 2d 189 (1st Dept. 1990)	20
Hellenic Lines, Ltd. v. Prudential Lines, Inc., 813 F.2d 634 (4th Cir. 1987)	10
Hercules Inc. v. Stevens Shopping Co., 765 F.2d 1069 (11th Cir. 1985)	10, 11, 12
Huber v. United States, 838 F.2d 398 (9th Cir. 1988)	20, 24, 25
Keen v. Detroit Diesel Allison, 569 F.2d 547 (10th Cir. 1978)	23
O'Donnell Transportation Co. v. M/V Marilyn Trader, 228 F. Supp. 903 (S.D.N.Y. 1963)	7, 8
Magnum Company v. Coty, 262 U.S. 159 (1923)	17

Contents

Page

PanAlaska Fisheries, Inc. v. Marine Construction & Design Co., 402 F. Supp. 1187 (W.D. Wa. 1975), *vacated on other grounds*, 565 F.2d 1129 (9th Cir. 1977) 11

Protectus Alpha Navigation Co. v. North Pacific Grain Growers, Inc., 767 F.2d 1379 (9th Cir. 1985) 23

Puerto Rico Ports Authority v. M/V Manhattan, 897 F.2d 1 (1st Cir. 1990) 20

Reliable Transfer Co. v. United States, 53 F.R.D. 24 (E.D.N.Y. 1971) 20

Smith v. Ithaca Corp., 612 F.2d 215 (5th Cir. 1980) 20

Southern Pacific Transportation Co. v. Tug Captain Vick, 443 F. Supp. 722 (E.D. La. 1977) 11, 12

Strehle v. United States, 820 F. Supp. 136 (S.D.N.Y. 1994) 20

United States v. Reliable Transfer Co., 421 U.S. 397 (1975) 11

Statutes Cited:

33 U.S.C. § 1231 22

43 U.S.C. § 1333 22

Contents

Page

46 U.S.C. § 2103 22

46 U.S.C. § 2306 22

46 U.S.C. § 6101 22

46 U.S.C. § 6301 22

46 U.S.C. § 6305 22

50 U.S.C. § 198(C) 22

Rules Cited:

Supreme Court Rules:

Rule 10 19

Rule 10.1 26

Rule 10.1(a) 19, 20

Federal Rules of Evidence:

Rule 402 ..... 22, 23

Rule 802 21

Rule 803(8)(C) 21, 22, 23, 25

Contents

Page

Other Authorities Cited:

Address of Chief Justice Vincent before American Bar Association, September 7, 1949, 69 S. Ct. V, VI 18

Lord Reid in, *The Statute of Liberty* [1971] 13

2 Lloyd's List L. R. 277 (H. L.) 13

Meadows and Markulis, *Apportioning Fault in Collision Cases*, 1 USF Mar. L.J. 1 (1989) 13

46 C.F.R. § 4.07-1(b) (1990) 22, 24

Respondent, Cleveland Tankers, Inc., respectfully asks this Court to deny the Petition for a Writ of Certiorari, seeking review of the Sixth Circuit's decision in this case.

COUNTERSTATEMENT OF THE CASE

A. The Underlying Proceedings.

This case was tried before the United States District Court for the Eastern District of Michigan under the Court's Admiralty and Maritime Jurisdiction. The Honorable Patrick J. Duggan heard several weeks of testimony and reviewed literally hundreds of exhibits in order to resolve the dispute among and between American Steamship Company ("American Steamship"), Cleveland Tankers, Inc. ("Cleveland Tankers") and Total Petroleum, Inc. ("Total"), as to the apportionment of fault for the results of the fire and explosion which occurred on September 16, 1990, when the BUFFALO passed the JUPITER then berthed at the Total dock on the Saginaw River in Bay City, Michigan.

On June 9, 1993, the District Court issued a ninety-two page, fact intensive Memorandum Opinion and Judgment as to liability only in which it found that the BUFFALO passed the JUPITER too closely and at an excessive rate of speed, thus violating its duty to proceed carefully and prudently in order to avoid creating unusual swells or suction upon moored vessels, and that such conduct was a proximate cause of the casualty. (Petitioner App. C, pp. 34a, 47a, 52a, 53a, 55a).

The District Court held that the JUPITER's crew was negligent for failing to close ullage caps prior to the BUFFALO's passing, and that the vessel was unseaworthy due to ill-fitting flame screens within those pipes. (Petitioner App. C, pp. 96a, 102a).

The District Court also held Total negligent for failing to discover latent dry rot within the #4 kingpin, and that this negligence was a proximate cause of the incident. (Petitioner App. C, p. 132a).

Ultimately, the District Court found that the conduct of the BUFFALO was much more egregious than that of the JUPITER or Total. The District Court specifically ruled:

> [t]his Court finds that, because the BUFFALO passed the JUPITER both dangerously fast and dangerously close, hence instigating the entire chain of events, primary fault shall rest with the BUFFALO. * * * (Citations omitted). This Court finds the conduct of the BUFFALO much more egregious than that of the JUPITER or Total Petroleum, Inc. This Court holds that the BUFFALO was 50% at fault, while the JUPITER and Total Petroleum, Inc. were each 25% at fault.

(Petitioner App. C., p. 133a).

American Steamship appealed the factual findings of the District Court and also claimed that the District Court erred in ruling that the conclusions contained in the United States Coast Guard's ("U.S.C.G.") report of the incident were inadmissible in evidence.

The Court of Appeals for the Sixth Circuit noted the fact intensive nature of the Opinion and rejected the claims of error made by American Steamship, specifically concluding that the District Court's findings of fact were well supported, and that the

allocation of fault was not clearly erroneous. (Petitioner App. A, pp. 9a, 11a, 15a).

Likewise, the Court of Appeals for the Sixth Circuit affirmed the District Court's exclusion of the Coast Guard's conclusions as legally correct. (Petitioner App. A, p. 17a).

B. Counterstatement Of Facts.

Cleveland Tankers would point out that American Steamship's submitted statement of facts is inappropriately replete with factual arguments and omissions. Indeed, the Petitioner's factual presentation is rather plainly an attempt to reargue the facts of this case, and thus bears little resemblance to an appropriate statement of facts within a Petition for Writ of Certiorari to the highest Court of this land. A fair and impartial statement of facts is contained in the Background section of the Trial Court's Opinion. (Petitioner App. C, pp. 21a - 27a).

The most glaring omission from Petitioner's factual summary is the uncontroverted fact that the BUFFALO was speeding by a moored petroleum tanker at between 6 to 9 miles per hour — a speed three to four times above what all parties agreed it was BUFFALO's duty to maintain.

At time of trial, American Steamship's Vice President specifically testified that prudence dictates that a moving vessel, when passing a moored vessel, reduce its speed to "bare steerage." (Trial Vol. VII, pp. 32, 33, 55, R. 317). He also stated that the company's captains serving aboard their vessels are expected to pass at the lowest possible speed in a passing situation — that is, bare steerage, which is approximately 2 to 3 miles per hour. (*Id.* at 47; *see also, McFalda* dep., pp. 112-115, R. 348).

A great volume of expert testimony was presented for the trial court's consumption regarding the BUFFALO's speed and

the hydrodynamic effects she imparted when passing the JUPITER. Armin Troesch, a professor of Naval Architecture at the University of Michigan specializing in dynamic movement, determined the BUFFALO's speed by analyzing how fast she had to be traveling in order to cause the physical events that were known to have occurred — that is, the movement of the JUPITER (10 to 12 feet aft within her berth); the fracture of 19 pilings of the No. 2 cluster; the breaking of the No. 4 kingpile; and, the loss of the bowline. He determined that if the BUFFALO had passed at 3 miles per hour, even if the JUPITER was sitting still at the dock not tied up in any way, her aft movement would have been less than 2 feet. (Trial Vol. XXVII, pp. 15, 105, 110, R. 342). Accordingly, if the BUFFALO had only been traveling 3 miles per hour, the accident would not have happened.

Professor Troesch found that only at approximately 8 miles per hour would there be sufficient surge forces created to match all of the physical observations so as to cause the accident. (*Id.*, p. 22). Accordingly, he determined that unquestionably the movement of the JUPITER was a direct result of the passage of the BUFFALO. (*Id. at* 104).

Likewise, Professor Nicholas Newman testified that the hydrodynamic forces created by the turbulence from the BUFFALO would have to be in the "tens of tons", requiring a speed of between 6 and 9 miles per hour. (Trial Vol. XXV, p. 126, R. 332). He concluded that if the BUFFALO had passed the JUPITER going only 2.5 to 3 miles per hour as claimed throughout the trial by American Steamship, the hydrodynamic effects would have been so small, that even if unmoored, the JUPITER would have moved only 1 to 2 feet. (*Id. at* 151-152).

Professor Guy Meadows calculated the speed of the BUFFALO according to a time and distance analysis. Depending upon the high and low range of factors, Professor Meadows'

calculations at trial demonstrated that the BUFFALO was traveling at between 6 to 9.2 miles per hour. (Petitioner App. C, p. 46a).

Finally, even American Steamship's hydrodynamic expert, Professor Robert Beck, conceded on cross examination that the BUFFALO had to have been going more than 4 miles per hour in order for the JUPITER to move aft into the wind that was present. (Petitioner App. C, p. 50a). Accordingly, by the testimony of their own expert, the BUFFALO was moving at least two times the speed it was obligated to maintain when passing a moored vessel.

It was precisely this body of uncontroverted expert testimony that the trial court cited in great detail in its Opinion that led to the finding that the BUFFALO's negligent behavior was most egregious and the primary cause of the incident. (Petitioner App. C, pp. 45a-53a).

Petitioner's factual summary also omits facts that are critical to an understanding of Cleveland Tankers' obligations as regards maintenance of flame screens and the closing of ullage caps.

While the trial court ultimately concluded that the JUPITER's flame screens were not properly fitted and that the ullage caps were negligently left in the open position, the court nonetheless noted that Cleveland Tankers was not in violation of any standards. (Petitioner App. C, p. 109a). Captain Theodore Polgar, a retired Coast Guard officer, retained as an expert for claimants, testified that when the Coast Guard inspects vessels, they are to ensure that equipment on board is satisfactory to perform the intended function and to confirm that the vessel's equipment meets the standards set forth in the Code of Federal Regulations. (Trial Vol. XI, p. 120, R. 323). He also testified that

the U.S.C.G. would, on their periodic inspections, check the propriety of the flame screens (*Id. at* 19) and that the U.S.C.G. was competent to determine if there were any violations regarding the fitting of the flame screens. (*Id. at* 22-23).

The uncontroverted facts show that the Coast Guard boarded the JUPITER dozens of times while the ship was loading and/or discharging cargo. It is undisputed that no complaints or citations were ever made regarding the propriety of the flame screen fit.

In addition, one of American Steamship's own experts in deposition specifically testified that the flame screens on the JUPITER were in his opinion, a "neat," "face-to-face" fit, "not having a gap in excess of the dimensions consistent with a 30 x 30 mesh." (Trial Vol. XIX, pp. 129-130, R. 339).

Furthermore, American Steamship's own fire expert, Professor Barry Shorthouse, testified that a properly fitted flame screen is designed to prevent the passage of flame for a "short period of time," which would have been overwhelmed by the flames in this case in only 5 to 10 seconds. (Trial Vol. XXV, pp. 99-101, R. 340).

Finally, regarding the issue of whether or not it is proper to close the ullage caps, again retired U.S.C.G. Captain Theodore Polgar specifically testified that while he personally believed it would be better to close the ullage caps, he agreed that there is nothing in the regulations, handbooks or any literature to support this preference. (Trial Vol. XI, p. 28, R. 323). Likewise, Captain Polgar testified that there is nothing in the Code of Federal Regulations which require that ullage caps be closed when discharging unleaded gasoline. (Trial Vol. X, pp. 74-75, R. 323).

Accordingly, the criticisms at trial of the JUPITER and her

crew regarding flame screens, open ullage caps, and shutdown procedures generally, were met by strong proofs of custom and practice in the industry as well as acceptance of the practice by the U.S.C.G. and even opposing experts. Therefore, the trial court's evaluation of the JUPITER's behavior in light of these proofs supports the result that JUPITER was not egregious or blatant in her negligence. Rather the nature of those proofs showed that the JUPITER's negligence was minimal and, indeed, arguably discernible only by hindsight analysis. By contrast, the proofs of the BUFFALO's dramatic speeding in light of the known risks and her own history of speeding repeatedly through the river highlighted the wantonness of her behavior and justified the trial court's imposition of the greatest portion of fault.

While Petitioner's factual presentation is omissive, it's representation of the district court's findings is misleading. The trial court's workmanlike 92 page Opinion speaks for itself. (Petitioner App. C). Nonetheless, Respondent must address Petitioner's misrepresentations of that Opinion.

Petitioner would have this court believe that the trial court found American Steamship negligent based solely upon an inappropriate legal presumption applied without regard to negligent behavior and that the appellate court then "bailed out" the trial court by searching for and finding a separate basis to support the imposition of liability against American Steamship.

The appellate court stressed that even if the the trial court relied in part upon the presumption set forth in *O'Donnell Transportation Co. v. M/V Marilyn Trader*, 228 F. Supp 903 at 909 (S.D.N.Y. 1963), the trial court also found that the BUFFALO's speeding resulted in an additional presumption of

negligence pursuant to the *Pennsylvania* Rule and wholly apart from that imposed by the *O'Donnell* case. (Petitioner App. A, p. 6a).

A review of the trial court's opinion makes it indisputably clear that the legal presumptions of fault were not applied against the BUFFALO in a factual vacuum. The proofs against the BUFFALO were overwhelming, such that the imposition of the greatest fault against it is supported by the facts, whether or not there is any legal presumption for American Steamship to additionally overcome.

Petitioner implies that the trial court dedicated only two paragraphs to the proportional fault analysis. (Petition for Writ, p. 8). Such a suggestion is ludicrous where it is obvious that the entire Opinion is a thorough analysis of the proportional fault each party must bear.

REASONS FOR DENYING THE WRIT

I.

THIS COURT SHOULD DENY CERTIORARI WHERE PETITIONER HAS NOT DEMONSTRATED ANY RELEVANT CONFLICT IN THE UNITED STATES APPELLATE COURTS, AND THE PETITIONER'S WRIT IS MERELY AN ATTEMPT TO REARGUE THE FACTUAL FINDINGS MADE BY THE TRIAL COURT AND AFFIRMED BY THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

A. Petitioner Fails To Present Any Conflict Of Law Or Legal Error In Support Of Its Writ.

Petitioner infers that there is confusion in the state of the law as to whether and to what degree "causation" should be factored

into proportional fault analysis. Petitioner does not cite any relevant conflict in the state of the law regarding proportional fault analysis and, indeed, it is apparent that the Petitioner is begging for factual reanalysis of the case while attempting to disguise its plea as legal dilemma.

The only conflict in circuit court opinions cited by Petitioner concerns the vitality of the doctrine of superseding cause. Petitioner points out that the Eighth and Fifth Circuits hold that the doctrine of superseding cause continues to apply in a proportional fault setting, while the Eleventh Circuit has ruled that it does not. (Petition for Writ, p. 11). The relevance of any conflict amongst the circuits regarding the doctrine of superseding cause is hard to imagine in the case at bar inasmuch as the Petitioner never raised superseding cause as a defense and, indeed, specifically disavowed reliance upon the doctrine of superseding cause in the case at bar. (Petition for Writ, p. 14, footnote 9; App. A, p. 14a, n. 6).

Petitioner makes the confusing proposal that the case at bar presents a "logical corollary" to the case of *Exxon Company U.S.A. v. Sofec, Inc.*, 54 F.3d 570 (9th Cir. 1995), *cert. granted,* 116 S. Ct. 493 (1995) — that is, whether differences in causal proximity must be a part of the proportional fault analysis. Petitioner argues that the District Court and Appellate Court each erred by not properly considering the role causation plays in a proportional fault analysis. Petitioner even adopts the "causative potency" description from earlier British courts' proportional fault analysis.

The absence of a superseding cause defense in the matter at bar highlights the folly of Petitioner's efforts to align its Writ of Certiorari with the granting of certiorari in the *Exxon* case. The *Exxon* case is solely and exclusively a superseding cause case in which the Court never needed to make a proportional fault

analysis. The case at bar is solely a matter involving the alleged impropriety of the proportional fault analysis — not a superseding cause case.

Despite Petitioner's semantic juggling, it is plain that Petitioner has not cited nor does there exist any confusion or split of opinion in the Federal Circuit Courts as to the role causation plays in a proportional fault analysis. Petitioner's suggestion that somehow causation was left out of the factoring flies in the face of the District Court Opinion, which specifically held the BUFFALO's negligent passing to be the primary cause of the disastrous event. (Petitioner App. C, p. 133a). One of the very cases cited by Petitioner specifically found that a defendant whose negligence was the primary cause of the collision should bear the greatest proportion of fault. *Hellenic Lines, Ltd. v. Prudential Lines, Inc.*, 813 F.2d 634 (4th Cir. 1987).

Most importantly, the Trial Court's entire 92 page opinion is replete with causation analysis. Ultimately, the Court properly concluded that it was the negligent behavior of all the parties which inextricably contributed as proximate causes of the disaster.

What Petitioner plainly desires but cannot find legal support for, is a proportional fault analysis rule which would clinically focus upon the chronology of the negligent acts leading to the ultimate incident. Petitioner's "causative potency" analysis is a thinly veiled attempt to fashion a proportional fault analysis which would always result in the last negligent act being most culpable and the earliest negligent act least culpable.[1] Aside from

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1. While specifically disclaiming any reliance upon such doctrines, Petitioner still presses arguments dependent upon such theories. Where proximate cause has been found against a defendant, no justification or basis exists for applying the doctrine of intervening negligence or last clear chance. *Hercules Inc. v. Stevens Shipping Co.*, 765 F.2d 1069, 1075 (11th Cir. 1985).

the fact that Petitioner never argued this theory to either of the lower courts, this proposition finds no support in the law. Indeed, case law and commentator analysis specifically reject such an analysis in a proportional fault setting.

Courts and authors are in unison that a proportional fault determination based upon a "degree" of causation is unrealistic and unworkable in assessing the fault of the various negligent parties. Following *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975), American courts have consistently engaged in a culpability or fault based behavioral evaluation of a negligent party to determine their percentage of fault in proportional fault cases. The federal courts have no difficulty understanding the nature of the term "fault" that is being proportioned.

The Petitioner has failed to cite a single Circuit Court case which stands for the proposition that the court should take into consideration "causative potency" when apportionating fault. The case of *PanAlaska Fisheries, Inc. v. Marine Construction & Design Co.*, 402 F. Supp. 1187 (W.D. Wa. 1975), *vacated on other grounds*, 565 F. 2d 1129, 1140 (9th Cir. 1977), involved a fire aboard the fishing vessel, *ENTERPRISE*, which the Court found was caused by a malfunctioning oil filter installed by the defendant, Marine Construction & Design Co. The Court also found that the plaintiff was negligent in causing the fire by not providing for a remote engine shutoff control when the vessel was rebuilt and for failing to clean and inspect tanks containing contaminated fuel oil. In holding the defendant responsible for only one-third of the damages, the Court stated "culpability, not causation, is the standard by which damages are assessed in comparative negligence cases." *Id.* at 1188.

Petitioner's reliance on *Hercules Inc. v. Stevens Shipping Co.*, 765 F.2d 1069 (11th Cir. 1985) and *Southern Pacific Transportation Co. v. Tug Captain Vick*, 443 F. Supp 722 (E.D.

La. 1977), is also misplaced since these cases stand for the proposition that apportionment is a question of culpability.[2] The *Hercules* court perhaps best described the type of argument proffered by American Steamship by noting, "[i]n our view, this is nothing more that a factual argument dressed in a legal argument's clothing." 765 F.2d at 1074.

The very maritime article cited by Petitioner in its Writ for Certiorari, in fact, champions the multitude of good reasons for using only culpability as the barometer of determining relative degrees of fault:

> [t]here is good reason to use only culpability as the standard to determine the relative degree of fault between vessels. In any collision case, there are usually several causative factors involved on each side. To attempt to separate each act of negligence or fault and then try to determine the extent to which such act contributed to the collision, i.e., caused it, is simply too difficult a task to be accomplished effectively. Instead, it makes more sense to look at each vessel's conduct as a whole, and then determine the effect of the totality of the faults (or negligence) had in proximately causing the collision.
>
> Once it is determined that both vessels are

2. While occasionally courts have described their evaluation as focusing on "culpability", it is plain that there is no palpable distinction between evaluating "culpability" and evaluating "fault". In every proportional fault case, the court, after determining the existence of proximate cause, evaluates the quality of the negligent parties behavior to determine relative culpability or fault.

> responsible for the collision, then it would be more equitable to apportion fault based on the relative culpability of the parties. Additionally, such a system of apportionment would be much more flexible and reasonable to apply by the court because it would be unnecessary to try to calculate the extent to which a particular fault caused the collision, a task even the experts have difficulty handling.

Meadows and Markulis, *Apportioning Fault in Collision Cases,* 1 USF Mar. L.J., 35-36.

The unmanageability of using "causative potency" in lieu of or in addition to the culpability (*i.e.*, "fault") analysis in determining percentages of fault amongst negligent parties was noted in the above cited article as follows:

> [a]lso, causative potency as a factor in apportioning fault is extremely difficult to determine. As one English judge stated, "I must confess that I find some difficulty in assessing causative potency in terms of percentages."

Id., at 28, n. 91, citing Lord Reid in, *The Statute of Liberty* [1971] 2 Lloyd's List L. R. 277, 282 (H. L.).

Petitioner's Writ must be denied because it lacks even a scintilla of legal support for the proposition that some legal conflict exists among the circuits on the issue of assessing proportional fault. Petitioner has not articulated any significant federal question to justify the scrutiny of the United States Supreme Court.

Finally, Petitioner's arguments that the lower courts erred by "failing" to apply a "superseding cause/causative potency" analysis in the proportional fault setting is deceptive. The first time "superseding cause" was heard or written in this case came in Petitioner's appeal to the Sixth Circuit Court of Appeals. The first time that "causative potency" was ever suggested as a component in proportional fault analysis was in its Petition to this Court. While Petitioner's propositions fail for want of legal merit, it is equally clear that lower courts cannot "fail" to consider legal theories and arguments that were never presented.

B. Petitioner Improperly Seeks Further Review Of The Lower Court's Factual Analysis And Findings.

That American Steamship is simply requesting this Court to reanalyze the facts and findings of the lower courts is most aptly demonstrated by what it has failed to tell this Court.

American Steamship mentions nothing of the uncontroverted proofs discussed in great detail in the Trial Court's Opinion that the BUFFALO was traveling at a spectacular rate of speed — a speed supported by every mathematical computation provided to the Trial Court in the case. The Trial Court dedicated over 20 pages of its 92 page opinion analyzing the lay and expert testimony regarding American Steamship's negligence in causing this accident. (Petitioner App. C, pp. 34a-56a). The Trial Court dedicated equally extensive factual analysis to the allegations against Cleveland Tankers (Petitioner App. C, pp. 66a-114a) and Total. (Petitioner App. C, pp. 115-132a).

While persistently arguing that the JUPITER was somehow improperly moored to the Total dock by virtue of the dock's internally rotted mooring post, American Steamship fails to mention that just hours before the BUFFALO made its passing, the CLYMER passed at a rate of speed estimated to be two to

three miles per hour, and caused absolutely no movement to the JUPITER, let alone damage. Accordingly, there was no dispute that the Total dock and the JUPITER's moorings withstood the surge forces of the CLYMER as she passed at a proper and safe speed. The CLYMER's safe passage demonstrates that the JUPITER was properly moored and was able to withstand expectant, normal surge forces.

While arguing that the Trial and Circuit Courts somehow misapprehended the role that foreseeability plays in assessing fault, American Steamship declares that it was not reasonably foreseeable that there would be a rotted kingpost or that ullage caps would be left open on the petroleum vessel moored at the subject dock. (Petition for Writ, pp. 18-19, n. 12). Petitioner then declares that the degree of a party's fault must necessarily be dependent upon the extent to which a loss was foreseeable, so that as foreseeability diminishes, relative fault must also diminish. (Petition for Writ, p. 20). To the extent this proposition has legal support, it works to impale the Petitioner by its own logic. Captain John McFalda, the master of the BUFFALO as it navigated past the JUPITER, admitted in sworn testimony that the very events he caused were foreseeable. Indeed, what Captain McFalda knew and could foresee when he passed the JUPITER, was the ultimate proof demonstrating his and his company's egregious fault in causing the accident. Captain McFalda testified that:

1. He recognized that a prudent mariner should pass a moored vessel by going "as slowly as possible". (Trial Vol. XII, p.106, R.324).

2. He believed that 90% of the docks on the Saginaw River are "lousy". (Trial Vol.XIII, p. 16, R.326).

3. He recognized that there were a number of petroleum docks in the vicinity of the Total dock, and was

aware that whenever you enter into a confined area such as existed on the Saginaw River, it poses a dangerous situation. (*Id.* at pp. 124-125).

4. He was aware of the operations at the Total facility, that is, that it was a facility involved in the distribution of petroleum, gasoline, fuel oil, and other flammable liquids. (R. 348, pp. 24-25).

5. He spotted the JUPITER when the BUFFALO was approximately 5,000 feet away. (Trial Vol. XIII, p. 91, R. 326).

6. He believed that the JUPITER, while docked at the Total facility, encroached on the shipping channel. (R. 348, p. 25).

7. He was aware in general terms of hydro-dynamic phenomenon, and has experienced the pulling effect on his moored vessel by a passing vessel. (R. 348, pp. 125, 162-63).

8. He knew, as a prudent mariner, that there is potential danger whenever there is a vessel moored at a Total facility, or for that matter, any petroleum facility since the vessels carry flammable liquids. (R. 348, p. 28).

9. He knew, as a prudent mariner, whenever there is a vessel docked at the Total facility, that there is a possibility that it is loading or carrying flammable liquids, and, as a prudent mariner, you must have a concern for a potential disaster such as happened here. (R. 348, p. 40).

10. As he navigated, he assumed that the JUPITER was unloading a petroleum product. (R. 348, p. 55).

11. Likewise, he also assumed or believed that the product being unloaded by the JUPITER had the potential to be flammable or explosive. (R. 348, p. 55).

12. He does not know what the speed of the BUFFALO was as it passed the JUPITER. (R. 348, p. 148).

If, indeed, the degree of a party's fault is commensurate with the extent to which an event was foreseeable, then plainly the BUFFALO's fault was justifiably found by the District Court and affirmed by the Appellate Court to exceed the faults of Cleveland Tankers and Total where the master of the vessel BUFFALO had specific awareness of the risks and consequences which the facts demonstrated were engaged and caused by the BUFFALO's passing.

Respondent does not wish to engage in a blow for blow countering of every factual argument and omission pressed by Petitioner in its Writ for Certiorari. Plainly, such a factual debate is at odds with the limited jurisdiction of the Supreme Court. As stated by Chief Justice Taft in 1923, in the case of *Magnum Company v. Coty*, 262 U.S. 159, 163 (1923):

> The jurisdiction [of the Supreme Court to review cases by way of certiorari] was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing.

Chief Justice Vincent in a 1949 speech before the American Bar Association likewise stressed the limited scope of Supreme Court review wherein he stated:

> The Supreme Court is not, and never has been, primarily concerned with the

> correction of errors in Lower Court decisions. In almost all cases within the Court's appellate jurisdiction, the petitioner has already received one appellate review of his case. * * * The function of the Supreme Court is, therefore, to resolve conflicts of opinion on federal questions that have arisen among lower courts, to pass upon questions of wide import under the constitution, laws, and treaties of the United States, and to exercise supervisory power over lower federal courts. * * * To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved.

(Address of Chief Justice Vincent before American Bar Association, September 7, 1949, 69 S. Ct. V, VI).

C. Conclusion.

Petitioner had 29 days of trial in which to make factual presentations. Thereafter Petitioner had the opportunity and did in fact submit their own proposed findings of fact and conclusions of law to the trial court which contained a multitude of legal and factual arguments. The court subsequently issued a 92 page factually intensive Opinion which Petitioner disagreed with. Accordingly, Petitioner appealed to the Sixth Circuit Court of Appeals seeking factual reanalysis by that court. The appellate court found no error.

Simply put, Petitioner has had all of its rightful opportunities for factual argument and reargument. This factual argument, disguised as a legal Writ of Certiorari, requires denial of American Steamship's Petition.

II.

THE SIXTH CIRCUIT CORRECTLY RULED THAT THE CONCLUSIONS AND OPINIONS CONTAINED IN THE UNITED STATES COAST GUARD REPORT WERE INADMISSIBLE.

A. American Steamship Has Not Demonstrated Any Basis For This Court To Grant Its Petition.

American Steamship asserts as its basis for obtaining its Writ of Certiorari that "[a] conflict exists among the admiralty courts as to whether conclusions contained in official investigative reports of the U.S.C.G. are admissible into evidence in trials arising from Marine casualties." (Petition for Writ, p. 22). In order to succeed on this basis, it is not enough that American Steamship simply demonstrate that there is some conflict on this point, but it must demonstrate that "a United States Court of Appeals has rendered a decision in conflict with a decision of another United States Court of Appeals on the same matter." Supreme Court Rule 10.1(a).[3]

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3. Rule 10. Considerations Governing Review on Writ of Certiorari

> .1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A Petition for writ of certiorari will be granted only when there are special and important reasons therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter; . . .

The only federal appellate courts which have spoken on the issue have found that the conclusion/opinion portions of U.S.C.G. reports are to be excluded and that only the factual portions are admissible. *Huber v. United States*, 838 F.2d 398 (9th Cir. 1988); *Smith v. Ithaca Corp.*, 612 F.2d 215 (5th Cir. 1980). The majority of other courts have concurred. *Strehle v. United States*, 820 F. Supp. 136 (S.D.N.Y. 1994); *Haggerty v. Moran Towing*, 556 N.Y. 2d 314, 162 A.D. 2d 189 (1st Dept. 1990); *Complaint of American Export Lines, Inc.*, 73 F.R.D. 454 (S.D.N.Y. 1977); *Reliable Transfer Co. v. United States*, 53 F.R.D. 24 (E.D.N.Y. 1971). In this case, the Court of Appeals for the Sixth Circuit correctly followed the Fifth and the Ninth Circuits, as well as the majority of other decisions on point, to hold that the conclusions/opinions of the U.S.C.G. report were not admissible.

American Steamship fails to cite a single Court of Appeals opinion which conflicts with the Fifth, Ninth and the Sixth Circuit on this issue, as it is required to do under Supreme Court Rule 10.1(a). American Steamship does cite one Court of Appeals case which it alleges held that U.S.C.G. conclusions are admissible. *Puerto Rico Ports Authority v. M/V Manhattan*, 897 F.2d 1 (1st Cir. 1990). In fact, this case did no such thing. There, the district court allowed the complete U.S.C.G. report into evidence. The appellant argued before the Court of Appeals for the First Circuit, that this was in error. The Court did not decide this issue, pointing out that the district court specifically found that although it reached the same conclusion as the Coast Guard regarding negligence (in this case, that the pilot of defendant vessel was negligent in attempting to dock the vessel at an excessive speed), "the Court made its own conclusion based on all the evidence submitted and presented at trial [and] [o]nly the fact-based portions of the report were considered by the Court." (*Id.* at 8, quoting from district court opinion). Thus, the First Circuit held that "even were the admission of the report error, it was harmless." *Id.*

B. The Plain English Language Of The Applicable Federal Rules Of Evidence Mandate Exclusion Of The Opinions/ Conclusions Portion Of The U.S.C.G. Report.

Federal Rule of Evidence 802 provides a general prohibition against the admission of the entire U.S.C.G. report as hearsay evidence. Federal Rule of Evidence 803(8)(C), however, specifically provides that the "factual findings" of reports, such as the U.S.C.G. report at issue, are admissible, although hearsay:

> [t]he following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> (8) Public records and reports. Records, reports, statements or data compilations, in any form, of public offices or agencies setting forth . . . (C) in civil actions and proceedings and against the government in criminal cases, *factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.*

(Emphasis provided).

The plain English meaning of these rules is that while the U.S.C.G. report is *prima facie* hearsay and excluded by F.R.E. 802, an exception has been carved out limited specifically to the "factual findings resulting from an investigation made pursuant to authority granted by law." On the rules' face, there is no issue that the only exception to the hearsay rule applicable to governmental investigation reports such as the U.S.C.G. report at issue, is the factual findings contained in such reports.

It is a cardinal rule of statutory interpretation that when an exception has been carved out of a general rule, that exception is to be strictly construed. *Addison v. Holly Hill Fruit Products*, 322 U.S. 607 (1944); *Andrus v. Glover Construction Co.*, 446 U.S. 608 (1980). As set forth by the Supreme Court in *Andrus*, in the absence of a contrary legislative intent, additional exceptions are not to be implied in statutes which explicitly enumerate certain exceptions to a general prohibition. Had congress desired to also exclude the opinions/conclusions section of investigative reports from the hearsay rule, clearly it would have specified so in F.R.E. 803(8)(C).

Furthermore, Congress has provided that the investigation by the U.S.C.G. and determinations made therefrom are not to be used to fix civil or criminal liability. 46 C.F.R. § 4.07-1(b) (1990). The regulation was promulgated by the Secretary of Transportation, pursuant to express acts of Congress: 33 U.S.C. § 1231, 43 U.S.C. §§ 1333, 46 U.S.C. § 2103, 2306, 6101, 6301, 6305, 50 U.S.C. § 198(C). In these provisions, Congress has directed the Secretary of Transportation (within which the U.S.C.G. operates) to prescribe regulations regarding ports and waterways safety (33 U.S.C. § 1231), inspection and regulation of vessels (46 U.S.C. §§ 6101, 6301 and 6305).

American Steamship once again argues that 46 C.F.R. § 4.07-1(b) does not effect the admissibility of any part of the U.S.C.G. report, since it is not an "Act of Congress" excluding relevant evidence as envisioned by F.R.E. 402.[4] (Petition for

4. F.R.E. 402 states:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence with is not relevant is not admissible.

Writ, pp. 24-25). Clearly, this is not accurate as the U.S.C.G. regulation at issue was promulgated in response to the direct orders of Congress, pursuant to the above statutes. American Steamship, as it did in its brief on appeal to the Court of Appeals for the Sixth Circuit, is artificially placing F.R.E. 402 in a vacuum, without relationship to F.R.E. 803(8)(C) and the applicable caselaw.

Finally, American Steamship cites the cases of *Keen v. Detroit Diesel Allison*, 569 F.2d 547 (10th Cir. 1978) and *Protectus Alpha Navigation Co. v. North Pacific Grain Growers, Inc.*, 767 F.2d 1379 (9th Cir. 1985), for the proposition that "federal courts have led the courts to strictly construe the evidentiary bar of F.R.E. 402 and permit admission of substantial parts of N.T.S.B. Investigation Reports." (Petition for Writ, p. 25). These cases do not stand for this proposition.

In the *Keen* case, the Court of Appeals for the Tenth Circuit allowed N.T.S.B. and F.A.A. accident investigators to testify as to what they observed at the accident site and the manner in which they conducted their investigation. (569 F.2d at 549, 551). The admissibility of the reports was not at issue. In fact, the Court of Appeals for the Tenth Circuit expressly pointed out that "neither of these witnesses testified to the proximate cause of the crash." *Id.* at 551.

In the *Protectus* case, the full N.T.S.B. report at issue was excluded by the district court. The Ninth Circuit affirmed, holding that the exclusion of the report was not in error, concluding that, ". . . such reports, to the extent that they express agency views or conclusions as to the probable cause of the accident, are excludable under the rule." (767 F.2d at 1385).

C. The Admiralty Caselaw Mandates The Exclusion Of The Conclusions/Opinions Portion Of The U.S.C.G. Report.

As indicated above, the majority of case law on point, including the only federal appellate decisions which have addressed the issue, is conclusive that the conclusion/opinion portions of a U.S.C.G. report are to be excluded and that only the factual portions are admissible.

American Steamship asserts in its Petition that the Ninth Circuit's holding in *Huber* is incorrect, since it "considered the admissibility of Coast Guard reports and the admissibility of National Transportation Safety Board (N.T.S.B.) reports together, failing to distinguish their materially different regulatory provisions." (Petition for Writ, p. 24). This is untrue. First, the admissibility of the conclusions and recommendations portion of a U.S.C.G. report, not of a N.T.S.B. report, was at issue in *Huber*. The Ninth Circuit aptly referenced similar statutory provisions applicable to N.T.S.B. and Nuclear Regulatory Commission investigative reports, pointing out their consistency with 46 C.F.R. § 4.07-1(b). *Id.* at 403. Second, the Ninth Circuit did specifically address and dismiss the argument that the evidentiary preclusive effect of language in a regulation such as 46 C.F.R. § 4.07-1(b) ought not to have the same force as a direct federal statutory provision such as is applicable to N.T.S.B. reports:

> [t]he only difference between the Coast Guard regulation banning the use of accident reports as evidence and a statute such as 49 U.S.C. § 1441(e) banning the use of aviation accident reports as evidence is that in one the Coast Guard acted pursuant to authority from Congress to promote safety on the high seas, and in the other, Congress acted directly in promoting air safety. Either way, the result is

> the same: all or portions of the reports are excluded from evidence on authority from Congress.

Id. at 403.

Finally, American Steamship once again relies upon *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153 (1988), in support of its argument that the lower court and Court of Appeals for the Sixth Circuit erred in not allowing the conclusions and opinions portion of the U.S.C.G. report into evidence. This case is entirely distinguishable and not controlling to the facts of the matter at hand.

The court in *Beech* was not concerned with the admission of a U.S.C.G. or N.T.S.B. accident investigation report. Rather, the court was faced with the question of to what extent a Judge Advocate Generals Report ("J.A.G. report") was admissible in civil litigation following the crash of a Navy training aircraft. Unlike N.T.S.B. and U.S.C.G. investigative reports, nowhere in the *Beech* case did the court reference any self-limiting provision on J.A.G. reports in civil proceedings. As such, the court in *Beech* was only concerned with the admissibility of the J.A.G. report under the F.R.E. 803(8)(C), and was not required to consider a congressional, statutory mandate preventing the use of an accident investigation report in civil proceedings.

D. Conclusion.

A plain English reading of the applicable rules of evidence and U.S.C.G. regulations clearly provides that the factual findings of U.S.C.G. reports are admissible, but that the conclusion and opinion portions of these reports are inadmissible in a civil proceeding. Every federal court of appeal which has addressed this specific issue has so held.

CONCLUSION

American Steamship has completely failed to establish, as it is required to do under Supreme Court Rule 10.1, that the federal Courts of Appeals are in conflict on any issue presented in its Petition. For the reasons set forth above, Cleveland Tankers requests this Honorable Court to deny American Steamship's Petition for Writ of Certiorari.

Respectfully Submitted,

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